INDEX

	Page
Petition	1
Jurisdictional Statement	2
Question For Review	4
Constitutional Provision	4
Statement Of The Case	4
Argument	7
Appendix	12

SUPREME COURT OF THE UNITED STATES

CORDELL HULL McPEAK
Petitioner

vs.

STATE OF NORTH CAROLINA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

TO THE HONORABLES, CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Cordell Hull McPeak, was indicted by the Grand Jury of Surry County, North Carolina, wherein he was charged with feloniously possessing and transporting implements for house breaking and feloniously prossessing and having under his control and feloniously transporting a large quantity of narcotic drugs, contrary to the form of the Statute in such case made and provided.

The petitioner and Leland Wesley Campbell were tried by a jury in the Superior Court of Surry County, North Carolina, and convicted of the crimes charged in the bill of indictment, and were sentenced to be confined in the State's prison for a term of fifteen years by the Superior Court Judge presiding over said Court. (R.p.6).

Appeal was perfected to the Supreme Court of North Carolina, which is the court of last resort in the State of North Carolina, and on December 14, 1955, in an opinion by Justice Parker, the Supreme Court of North Carolina affirmed the judgment pronounced by His Honor, Walter E. Johnston, Presiding Judge at the February, 1955, term of Superior Court of Surry County, North Carolina. The opinion of the North Carolina Supreme Court in the case of State v. Cordell Hull McPeak is reported in Volume 243, at Page 243, of the North Carolina Reports, which is the official report of the North Carolina Supreme Court. The opinion of the North Carolina Supreme Court rendered in the case of State v. Cordell Hull McPeak appears fully in the Appendix to this petition and conforms with the certified copy of the opinion certified by the Clerk of the North Carolina Supreme Court.

Your petitioner respectfully petitions this Court to grant a Writ of Certiorari, directed to the Supreme Court of North Carolina, to the end that this Honorable Court may review the petitioner's case, so that petitioner's rights under theConstitution of the United States may be properly adjudicated by this court.

JURISDICTIONAL STATEMENT

The petitioner contends that his conviction in the Superior Court of Surry County, North Carolina, was based upon evidence illegally obtained and that the judgment entered on December 14, 1955 by the Supreme Court of North Carolina affirming his conviction violates the due process clause of the Fourteenth Amendment to the United States Constitution.

On March 13, 1956, your petitioner applied to the Supreme Court of the United States for an extension of time in which to file a petition for a Writ of Certiorari

in this cause, and this application was granted by an Order signed by the Hon. Harold A. Burton, Associate Justice of the Supreme Court of the United States, extending time in which to file Petition for Certiorari to and including March 23, 1956.

Petitioner further contends that this Court has jurisdiction to hear this cause on a Writ of Certiorari by reason of the following:

Title 28 U. S. C. A. 344 (b):

It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgement or decree hes been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statut of the United States; or where is drawn in question the validity of a statue of any State on the ground of its being repugant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercerised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this

paragraph.

QUESTION PRESENTED FOR REVIEW

Does the conviction of the petitioner in the North Carolina State Courts, based on evidence illegally obtained, violate the Fourteenth Amendment to the United States Constitution?

CONSTITUTIONAL PROVISION

The petitioner contends that his conviction in the North Carolina Courts, based upon evidence illegally obtained, violates the due process clause to the Fourteenth Amendment to the United States Constitution, which is Section I of the Fourteenth Amendment to the United States Constitution, which is as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On February 1, 1955, the petitioner, Cordell Hull McPeak, in the company of one Leland Wesley Campbell and one Ray Hemmings, was proceeding upon a public highway near Mount Airy, in Surry County, North Carolina, operating an automobile bearing Florida license tags. Officer J. B. Howell, of the North Carolina State Highway Patrol, accompanied by two deputy sheriffs of Surry County, North Carolina, stopped the automobile which the petitioner Cordell Hull McPeak was operating for a

"ROUTINE CHECK". (R. p. 8). Officer J. B. Howell then stated to the petitioner, Cordell Hull McPeak, that he would like to search his automobile, and told him that he didn't have to let him search the automobile if he didn't want to. Thereupon, your petitioner made the following reply; "WELL, THERE IS NOTHING ON THE CAR", (R.p. 9). Petitioner walked back to the car, took the switch key out, and walked to the rear of the automobile and unlocked the trunk. The petitioner then raised the lid of the trunk and unzipped a leather case and fumbled through some articles of clothing and said, "SEE, I DON'T HAVE ANYTHING" (R.p. 9). At this time one of the occupants of the petitioner's car, one Ray Hemmings, jumped from the petitioner's automobile and ran from the vicinity of the automobile. Officer J. B. Howell, without making any further request to the petitioner to search petitioner's automobile, then got into the front seat of petitioner's automobile and thereupon searched the rear seat of the petitioner's automobile, at which time he found a paper bag. He took a bottle from the paper bag which bottle contained a label with "MORPHINE SULPHATE" written on the label. The petitioner was then taken into custody and was taken to the Mount Airy, North Carolina, police station, and upon further examination of the petitioner's automobile, various articles were found and were introduced into evidence against the petitioners, over his objection at the trial.

The State of North Carolina does not contend that Officer J. B. Howell was armed with a search warrant authorizing him to search the petitioner's automobile, nor does the State of North Carolina contend that Officer J. B. Howell nor the deputy sheriffs of Surry County who accompanied Officer Howell and aided in the arrest of the petitioner, had any personal knowledge or reason to be-

lieve that the automobile of the petitioner contained implements for housebreaking or the unauthorized possession of narcotic drugs. The State of North Carolina, in order to convict this petitioner, relied wholly and exclusively on the evidence and testimony obtained as a result of the unlawful search made by Officer J. B. Howell, without a validly issued search warrant authorizing him to search the petitioner's automobile. At the petitioner's trial in the Superior Court of Surry County, North Carolina, prior to the introducton into evidence of the testimony of the State's witnesses pertaining to the items discovered as a result of the unlawful search, the defendants moved to suppress the testimony of the State's witnesses and moved to suppress all evidence obtained as a result of the unlawful search, "on the grounds of North Carolina General Statutes 15, Sub-section 27, and North Carolina General Statutes 18, Sub-Section 6." (R. p. 10). The motion to suppress was thereupon denied, the Court finding as follows: "THE COURT FINDS AS A FACT THAT McPEAK GAVE PERMISSION TO THE OFFICERS TO SEARCH THE CAR. THE COURT FURTHER FINDS AS A FACT THAT IT WAS A LEGAL SEARCH AND THAT THE EVIDENCE FOUND THERE IN THE CAR WAS COMPETENT AND OVERRULES THE MOTION BY DEFENDANTS TO SUPPRESS THE TESTIMONY". (R.p.10).

Upon appeal to the Supreme Court of North Carolina, the following question was submitted for the decision of that Honorable Court as follows: "WERE THE IMPLEMENNTS OF HOUSE BREAKING AND NARCOTIC DRUGS FOUND IN McPEAK'S AUTOMOBILE ADMITTED IN EVIDENCE IN VIOLATION OF THE PROVISIONS OF GENERAL STATUTE 15 AND 27, ARTICLE 1, SECTION 11, OF THE STATE CONSTI-

TUTION AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION". From the opinion filed by the North Carolina Supreme Court, which appears fully in the Appendix to this petition, it is apparent that the Federal question was properly raised and determind by the North Carolina Supreme Court.

ARGUMENT

The petitioner contends that his conviction in the Superior Court of Surry County, North Carolina, was based entirely and exclusively upon evidence obtained in the course of the search of his automobile by Officer J. B. Howell, of the State Highway Patrol, without a lawful search warrant under conditions requiring a search warrant. The petitioner further contends that said evidence was admitted in the trial court over his objection and that said evidence was not admissible by virtue of Chapter 15, Section 27, of the General Statuts of North Carolina, which in essence makes evidence obtained in the course of any search made under conditions requiring the issuance of a search warrant inadmissible in the trial of any action. The petitioner further contends that his conviction, based upon evidence thus illegally obtained, violates not only the Constitution of North Carolina but the United States Constitution, particulary the due process clause of the Fourteenth Amendment to the United States Constitution. Wolfe v. Colorado, 338 U. S. 25.

The petitioner further contends that the Honorable Trial Court in which this petitioner was tried inititially erred in denying the petitioner's Motion to suppress all evidence obtained in the course of the search and further contends that His Honor erred in his finding that the petitioner consented to the search and that the evidence obtained thereby was admissible in the trial of the action.

The North Carolina Supreme Court, as well as the United States Supreme Court, has repeatedly held that the constitutional privilege of freedom of unreasonable search may be waived by consent of the owner of the premises; however, these decisions clearly point out that a consent must be voluntary and free from all coercion in order to constitute a waiver of one's constitutional privileges. The petitioner strongly contends that the testimony of the State's witness, J. B. Howell, is not sufficient to warrant the Trial Court in finding as a fact that the petitioner by his actions consented to the search and waived his constitutional privilege of freedom against unreasonable searches.

In order to clearly understand the petitioner's position in regard to the question of consent which would constitute a waiver, it is necessary to look closely at the chronological order of events as they transpired at the time of the unlawful search. While it is true that the petitioner took the ignition key from the ignition of the automobile and unlocked the trunk or luggage compartment of the automobile and he, the petitioner, showed the arresting officers articles in the trunk, it is significant that the officer did not begin his search until one of the occupants of the petitioner's automobile ran from the vicinity of the automobile. Immediately prior to this occurrence, i. e., the flight of one of the occupants of the automobile, no further conversation had been had between Officer Howell and the petitioner in regard to the petitioner consenting to a through search of the entire automobile. At the time when the search by the officers began, the officer did not have a search warrant secured for the purpose of searching the petitioner's automobile, but rather it was an arbitrary intrusion into the privacy of the petitioner's automobile on the part of the arresting

officer. In the opinion of the North Carolina Supreme Court, by Mr. Justice Parker, where he makes the following comment: "THE STATE HAVING INTRODUCED EVIDENCE SUFFICIENT, PRIMA FACIE, TO SHOW A WAIVER, IF McPEAK WISHED TO DISPUTE THE FACT OF WAIVER, HE SHOULD HAVE OFFERED SOME PROOF CONTROVERTING THE SHOWING MADE BY THE STATE"; the use of the words, "PRIMA FACIE" is significant and points out the weakness of the State's decision in relying upon the evidence obtained as a result of the unlawful search based on the Trial Court's ruling that the petitioner had freely and voluntarily consented to the search. More is required to constitute a clear, concise, categorical consent to a search which will constitute a waiver of one's constitutional immunities than a mere prima facie case. The petitioner contends that it is necessary for the State to show beyond a reasonable doubt that the petitioner clearly and unequivocally consented to a search of his automobile, if said search is made under conditions requiring a search warrant before the Trial Court can find as a matter of law that the petitioner had waived any of his constitutional immunities secured to him by the due process clause of the Fourteenth Amendment to the United States Constitution.

The petitioner further submits to the Court that the law does not require the defendant to become a witness in his own behalf to rebut an inference, presumption or prima facie case, to constitute a waiver of constitutional immunity. It should also be called to the Court's attention that the record in this case discloses that the petitioner, through his counsel, moved to suppress the evidence obtained as a result of the unlawful search and that the record discloses that the Trial Court did not hear any ad-

ditional testimony of the State on the Motion to suppress nor did the Trial Court offer the defendants an opportunity to controvert the State's evidence pertaining to the unlawful search but rather arbitrarily and pre-emptorily denied the petitioner's Motion and found as a fact that the petitioner had consented to the search and that his consent constituted a waiver of his constitutional privilege and that the evidence obtained thereby was admissible.

In reference to the freedom from unreasonable searches and seizures and the privilege of not being compelled to give incriminating evidence against one's self in the trial of a criminal action, this Honorable Court has held that such rights are declared to be indispensable to the full and safe enjoyment of personal liberty and private property. These freedoms are regarded as the very essence of constitutional liberty and the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen, and this Honorable Court has frequently ruled that these freedoms should be given libral construction so as to prevent a stealthy encroachment upon or gradual depression of the rights secured by them by imperceptible practice of Courts or by well intentioned but mistakenly over-zealous executive officers. Gouled v. United States, 255 U. S. 298, at page 304.

In conclusion, the petitioner strongly urges the Court to take jurisdiction of this case by granting his petition for a Writ of Certiorari directed to the Supreme Court of the State of Norh Carolina to the end that the personal liberties and freedoms not only of the petitioner but of all individuals may be adjudicated and protected from the arbitrary and unlawful acts of over-zealous State law enforcement officers.

General Statutes of N. C., Chapter 15, Section 27
Constitution of North Carolina, Article 1, Section 11
Fourteenth Amendment to the United States Constitution
Wolfe v. Colorado, 338 U. S. 25
Irvine v. California, 347 U. S. 128
Rochin v. California, 342 U. S. 165
Schwartz v. Texas, 344 U. S. 199
Palko v. Connecticut, 302 U. S. 319
Adamson v. California, 332 U. S. 46
Hurtado v. California, 110 U. S. 516
Twining v. New Jersey, 211 U. S. 78
In re: Walters, 229 N. C. 111, p. 113; 47 S. E. 2d 709, p. 710
State v. Simmons, 192 N C. 692; 135 S. E. 866, p. 867
Vernon v. State of Alabama, 313 U. S. 547
Malinski v. State of New York, 324 U. S. 401
Stefanelli et al v. Minard et al, 342 U. S. 117
Weeks v. United States, 232 U. S. 379
Title 28, United States Code Annotated, Section 344-B
State v. Godette, 188 N. C. 497
Gouled v. United States, 255 U. S. 298

Respectfully submitted, this the____day of March, 1956

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APPENDIX

Opinion of the North Carolina Supreme Court in the Case of State v. Cordell Hull McPeak, filed 14th December, 1955, reported Volume 243 North Carolina Reports at Page 243.

Opinion by Parker, Judge:

The defendants' assignments of error present one question for decision: Were the implements of housebreaking and the narcotic drugs found in McPeak's automobile admitted in evidence in violation of the provisions of G. S. 15-27, Article, Section 11, of the State Constitution and the 14th Amendment to the U. S. Constitution:

It is well settled law that a person may waive his right to be free from unreasonable searches and seizures. A consent to search will constitute such waiver, only if it clearly appears that the person voluntarily consented, or permitted, or expressly invited and agreed to the search. Where the person voluntarily consents to the search, he cannot be heard to complain that his constitutional and statutory rights were violated. S. v. Moore, 240 N. C. 749, 83 S. E. 2b 912 (where many cases are cited); Zap v. U. S. 328 U. S. 624, 90 L. Ed. 1477; People v. Preston, 341 III. 407, 173 N. E. 383; 77 A. L. R. 631; 47 Am. Jur., Searches and Seizures, Sec. 71; 79 C. J. S., Searches and Seizures, Sec. 62.

"No rule of public policy forbids its waiver". Manchester Press Club v. State Liquor Com., 89 N. H. 442, 200 A. 407 116 A. L. R. 1093.

The facts in Sims v. State, 73 Okla. Cr. 321, 121 P. 2d 317, are quite similar. The first headnote reads: "Where motorist, on request of highway patrolmen who

stopped him for driving contrary to rules of the road, opened turfleback of automobile, disclosing whiskey, there was a 'waiver' by motorist of immunity from unlawful search."

In the case at bar there was no display of force or firearms, no promises, no threats, no coercion of any kind. Howell told McPeak he would like to search his car, but he told him, "he didn't have to let us search his car, if he didn't want to". McPeak said, "Well, there's nothing on the car," got his switch key, unlocked the car's trunk, raised the lid, unzipped a leather bag or case (it is called by both names in the evidence) he had in there, fumbled through some articles of clothing in the bag, and said, "See, I don't have anything". At that time the officer saw a five or six-pound sledge hammer lying in the trunk of the car. In the search the officer found in the bag McPeak unzipped a pottle of nitro-glycerine, some dynamite caps with short fuses attached, and a bar of soap wrapped up in a wet washcloth. The State having introduced evidence sufficient, prima facie, to show a waiver, if McPeak wished to dispute the fact of waiver, he should have offered some proof controverting the showing made by the State. Jones v. State, 33 Okl. Cr. 369, 244 P. 456. He failed to do so. We conclude that the acts and language of McPeak constituted a free and voluntary consent on his part to the search of his automobile by the officer, and a waiver on his part of his immunity from an unlawful search.

The lower court found as a fact tthat McPeak gave permission to the officer to search his car, that it was a legal search, that the evidence was competent, and overruled tthe motion "to suppress all evidence obtained through tthte search." The ruling of the trial judge as to the competency of this evidence, which is supported by

competent evidence, will not be disturbed on appeal. S. v. Moore, supra.

The Oldsmobile was the property of McPeak and in his possession. Campbell was a passenger therein. The person ofCampbell was not searched.

The immunity to unreasonable searches and seizures is a privilege personal to those whose rights thereunder have been infringed. They alone may invoke it against illegal searches and seizures. Goldstein v. U. S., 316 U. S. 114, 86 L. Ed. 1312; Kelley v. U. S., 61 F. 2d 843, 86 A. L. R. 338; U. S. v. DeVasto, 52 F. 2d 26, 78 A. L. R. 336; Steeber v. U. S., 198 F. 2d 615, 33 A. L. R. 2d 1425; 79 C. J. S., Searches and Seizures, Sec. 52, where numerous cases are cited from many jurisdictions; 47 Am. Jur., Searches and Seizures, Sec. 11.

The Oldsmobile belong to McPeak; Campbell was a passenger or guest therein. Campbell's rights were not invaded by the search of McPeak's car, and he had no legal right to object thereto. Smith v. State, 198 Miss. 788, 24 So. 2d 85; Lee v. State 148 Tex. Cr. 220, 185 S. W. 2d 978; Anderson v. Commonwealth, 312 Ky. 768, 229 S. W. 2d 756.

In Lee v. State, supra, a state highway patrolman arrested Lee on a highway about 12 miles west of Fort Worth; at the time of Lee's arrest he was riding with a man who was going to Fort Worth; the officer searched the car without a warrant, and found an automatic pistol under the seat where Lee was riding. This pistol was used to commit the murder with which Lee was charged. It was admitted in evidence. Lee objected to any evidence of the search and the result thereof, because the search was made without a search warrant. The Texas Court said we see no merit in the objection for two reasons: "First, the

automobile did not belong to appellant. Consequently his rights were not invaded by the search and he had no legal right to object thereto, (citing authorities). Second, the offcer who made the arrest had theretofore been advised that appellant had committed a felony and was fleeing. Hence the officer had a legal right, under article 215, C. C. P. to arrest the appellant without a warrant, and the arrest carried with it the right to search him."

The cases cited by the appellants are distinguishable.

The evidence challenged by the appellants was admissible against both defendants. In the trial below we find No error.